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TREATIES: FISHING RIGHTS IN THE PACIFIC NORTHWEST—THE SUPREME COURT "LEGISLATES" AN EQUITABLE SOLUTION

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In 1970 the United States, on its own behalf and as trustee for seven Pacific Northwest Indian tribes,[1] brought suit in federal district court against the state of Washington.[2] The government alleged Washington state's statutory and regulatory scheme for managing its fisheries was interfering with the fishing rights of the tribes. At issue was the interpretation of the tribal treaties securing to the Indians a "right of taking fish . . . *in common with* all citizens of the Territory."[3]

The district court held that the treaties entitled the tribes to approximately 50 percent[4] of the harvestable fish passing through recognized tribal fishing grounds in the case area.[5] The Ninth Circuit affirmed,[6] and the Supreme Court denied

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1. Additional tribes eventually became involved in this and the other cases consolidated for review in the instant case. The parties ultimately included the following tribes: Hoh; Lower Elwha Band of Clallam Indians; Lummi; Makah; Muckleshoot; Nisqually; Nooksack; Port Gamble Band of Clallam Indians; Puyallup; Quileute; Quinault; Sauk-Suiattle; Skokomish; Sqaxin Island; Stillaguamish; Suquamish; Swinomish; Tulalip; Upper Skagit; the Yakima Nation.

2. Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n, 443 U.S. 657 (1979).

3. *See* Treaty of Medicine Creek, art. 3, 10 Stat. 1132 (1854) (emphasis added).

4. United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). The district court decision was framed in terms of an "*opportunity* to take up to 50% of the harvestable number of fish." 384 F. Supp. at 343 (emphasis added). Fish taken by the Indians on their reservations were not counted against their share. *Id.* The district court also excluded from the treaty share those fish caught for ceremonial and subsistence purposes. *Id.*

5. The "case area" was defined by the district court as "that portion of the State of Washington west of the Cascade Mountains and north of the Columbia River drainage area, and includes the American portion of the Puget Sound watershed, the watersheds of the Olympic Peninsula north of the Grays Harbor watershed, and the offshore waters adjacent to those areas." 384 F. Supp. at 328.

6. United States v. Washington, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). In a separate opinion, the Ninth Circuit held that an agreement between Canada and the United States, which was secured by regulations formulated by the International Pacific Salmon Fisheries Commission, did not preempt the Indian tribes' entitlement to 50 percent of the American harvest of fish runs subject to the United States-Canada agreement. United States v. Washington, 573 F.2d 1118 (9th Cir. 1978). This ruling was upheld in the instant case and is not further discussed in this Note. *See* Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n, 443 U.S. 657, 696 (1979).

certiorari.[7] The district court subsequently ordered Washington state's Department of Fisheries to adopt regulations implementing the judicially affirmed treaty rights.[8] New regulations were adopted but were immediately challenged by private citizens in suits commenced in Washington state courts.[9]

Two such cases reached the Washington Supreme Court,[10] which interpreted the treaties as granting to the tribes merely a right to compete with nontreaty fishermen on an individual basis.[11] The state's highest court held that the district court's recognition of special allocation rights for treaty Indians violated the equal protection clause of the fourteenth amendment.[12] It further held that Washington's Fisheries Department lacked authority to adopt enforcement regulations in compliance with the district court's order protecting the treaty rights.[13]

In response to these decisions, the federal district court entered a series of orders enabling it, with the aid of federal law enforcement agencies, to supervise the state's fisheries directly to preserve the treaty fishing rights.[14] The district court's power to take such action was affirmed by the Ninth Circuit.[15]

The United States Supreme Court granted certiorari in the federal and state cases,[16] which were consolidated for review. In

7. United States v. Washington, 423 U.S. 1086 (1976).

8. United States v. Washington, 384 F. Supp. 312, 416-17 (W.D. Wash. 1974).

9. *See* Washington State Comm'l Passenger Fishing Vessel Ass'n v. Tollefson, 89 Wash. 2d 276, 571 P.2d 1373 (1977); Puget Sound Gillnetters Ass'n v. Moos, 88 Wash. 2d 677, 565 P.2d 1151 (1977).

10. *Id.* (both cases).

11. The court stubbornly said, "Being cited no authority for the proposition that federal district courts have exclusive jurisdictional [*sic*] to construe Indian treaties—treaties which affect important interests of the state—we adhere to our own interpretation of the treaty." Puget Sound Gillnetters Ass'n v. Moos, 88 Wash. 2d at 679, 565 P.2d at 1158.

12. "[T]he granting of more than 50 percent of the harvestable fish to .028 percent of the population (treaty Indians) and less than 50 percent to 2,243,069 non-Indian population, violates the equal protection clause of the fourteenth amendment to the United States Constitution." Washington State Comm'l Passenger Fishing Vessel Ass'n v. Tollefson, 89 Wash. 2d 276, 285-86, 571 P.2d 1373, 1378 (1977).

13. This holding was a principal reason why the Supreme Court granted certiorari in the instant case. *See* Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n, 443 U.S. 658, 674 (1979).

14. United States v. Washington, 459 F. Supp. 1020 (W.D. Wash. 1978).

15. Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123 (9th Cir. 1978).

16. The cases consolidated for review were Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123 (9th Cir. 1978); United States v. Washington, 573 F.2d 1118 (9th Cir. 1978); Washington State Comm'l Passenger Fishing Vessel Ass'n v.

Washington v. Washington State Commercial Passenger Fishing Vessel Association,[17] the Supreme Court, with three Justices dissenting, affirmed in pertinent part the district court's interpretation of the treaty fishing rights[18] and vacated the Washington Supreme Court decisions.[19] The Court found that the treaty language secured to the Indian tribes the right to harvest up to 50 percent of each run of fish that passed through tribal fishing areas, rather than merely a right to compete with nontreaty fishermen on an individual basis.[20] The Court, however, left the door open to future modifications; exact allocations to the tribes could be reduced if tribal needs could be satisfied by a lesser amount.[21]

Finally, the Court held that the state regulations prohibiting compliance with the district court's orders could not survive the mandate of the supremacy clause;[22] hence, Washington's Fisheries Department could be ordered to adopt regulations implementing the district court's interpretation of the treaty fishing rights.[23]

I. *Background*

A. *The Subject of Litigation: Anadromous Fish*

The contested resource in the instant case was anadromous fish; that is, salmon and trout that spend successive portions of their life cycles in fresh, then salt, and finally fresh water.[24] Five species of salmon—chinook, coho, chum, pink, and sockeye—and one species of trout—steelhead—comprise the resource over which the state of Washington and treaty and nontreaty fishermen have fought so fervently in the last decade.[25]

Tollefson, 89 Wash. 2d 276, 571 P.2d 1373 (1977); and Puget Sound Gillnetters Ass'n v. Moos, 88 Wash. 2d 677, 565 P.2d 1151 (1977).

17. 443 U.S. 657 (1979).

18. *Id.* at 685-86. See note 97 and accompanying text *infra.*

19. 443 U.S. at 696.

20. *Id.* at 685.

21. *Id.* at 685-86.

22. U.S. CONST. art. 6, § 2.

23. 443 U.S. at 695.

24. The fish hatch in fresh water, migrate to the ocean where they reach maturity, and return eventually to fresh water to spawn. Brief for Petitioners, Washington State, at 15, Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n, 443 U.S. 657 (1979).

25. Brief for Petitioners, Washington State, at 16, *id.*

These fish are caught or "harvested"[26] at a rate of approximately eight million fish a year.[27] The annual value of the harvested salmon resource in the Puget Sound alone approaches $50 million.[28] More than 6,600 nontreaty fishermen and about 800 treaty Indians made their livelihood by commercial fishing in Washington state.[29] In addition, more than 280,000 individuals are licensed for sport fishing in the state.[30]

For centuries, the treaty tribes have depended on anadromous fish for their livelihood, subsistence, and religious customs.[31] Because the migrating fish are not confined to inland lakes or other restricted areas, the tribes argue that without special allotment protection, their fishery resource will be depleted before reaching the treaty fishing sites.[32] While regulation of the anadromous fisheries in the Pacific Northwest is complicated by the migrating habits of the fish, the principal confusion has involved the treaties reserving the tribal fishing rights and the question of how to interpret those rights.

B. *The Tribal Treaties*

To secure land for settlement in what is now the state of Washington, the United States in 1854 and 1855 entered into six treaties[33] with the various Pacific Northwest Indian tribes. The

26. As the term "harvest" suggests, the management of anadromous fisheries in the state of Washington is similar in many respects to the cultivation of crops. The "harvestable" number of fish is the number that can be caught within conservation limits. *See* 443 U.S. at 663.

27. Petitioners' Brief for Certiorari, Washington State, at 6, Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n, 443 U.S. 657 (1979).

28. Petitioners' Brief for Certiorari, Washington State, at 7, *id.*

29. United States v. Washington, 384 F. Supp. 312, 387 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

30. 443 U.S. 657, 664 n.4 (1979). "Although in terms of the number and weight of fish involved, the commercial salmon catch is far more substantial than the recreational steelhead catch, the latter provides the State with more revenue, involves more people, and accordingly has been a more controversial political issue within the State." *Id.*

31. Brief for Respondents, United States, at 60, Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n, 443 U.S. 657 (1979).

32. Brief for Respondents, United States, at 62. Opponents consider this argument to be academic, because the tribes' "usual and accustomed" fishing grounds "include virtually every body of water in Washington State except some small lakes." Reply Brief for Petitioners, Washington State, at 2, Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n, 443 U.S. 657 (1979).

33. The six treaties are: Treaty with the Quinaults (Treaty of Olympia), 12 Stat. 971 (1855); Treaty with the Yakimas, 12 Stat. 951 (1855); Treaty with the Makahs (Treaty of Neah Bay), 12 Stat. 939 (1855); Treaty of Point No Point, 12 Stat. 933 (1855); Treaty of Point Elliot, 12 Stat. 927 (1855); and Treaty of Medicine Creek, 10 Stat. 1132 (1854).

tribes held large tracts of land, stretching along the many rivers and streams of the Washington Territory to the Puget Sound.[34] The Indian population at this time had diminished to less than 8,000.[35] White settlers, numbering no more than 2,000,[36] depended on the more expert Indians to supply them with salmon and trout.[37]

In exchange for ceding their land to the United States, the tribes received monetary payments, small parcels of land for their exclusive use, and other guarantees, including the protection of their tribal fishing practices on the reservations.[38] In addition, each of the six treaties contains a provision securing off-reservation fishing rights. The following is typical:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, *in common with all citizens of the Territory,* and of erecting temporary houses for the purpose of curing together with the privilege of hunting, gathering roots and berries . . . on open and unclaimed lands. . . .[39]

Four different interpretations of the "in common with" treaty language have been advanced over the last several years of litigation: (1) the treaties guarantee to the tribes only a right of access over private lands to usual and accustomed tribal fishing grounds; they require no allocation to the Indians of a specified share of the runs passing through the traditional tribal fishing areas;[40] (2) the treaties secure to the tribes either a 50 percent share of the harvestable fish that pass through their fishing places, or the amount that fulfills their reasonable needs, whichever is less;[41] (3) the treaties reserve to the tribes a preexisting right to as many fish as commercial and subsistence needs dictate, even exceeding half the harvestable resource if necessary;[42] and (4) the tribes are entitled to a specific percentage of the harvestable fish, regardless of need.[43]

34. Brief for Respondents, United States, at 55, 443 U.S. 657 (1979).

35. *Id.*; Brief for Petitioners, Washington State, 28.

36. 443 U.S. at 664.

37. Brief for Respondents, United States, at 55, *id.*

38. 443 U.S. 658 (1979).

39. Treaty of Medicine Creek, art. 3, 10 Stat. 1132, 1133 (1854) (emphasis added).

40. The Game Department took this position. 443 U.S. at 657-58.

41. The United States took this position. *See* Brief for Respondents, United States, at 70, *id.*

42. This has been the argument of the Indian tribes. *See* 443 U.S. 657-58 (1979).

43. *Id.* Washington state's Department of Fisheries proposed that the Indians be entitled to a strict one-third share of the fish.

Resolving this treaty interpretation conflict requires looking to the historical setting of the treaty negotiations. Contemporaneous writings, treaty minutes, and other available information strongly indicate the original intent of the government was to provide the Indians merely with the right of access to their traditional fishing grounds.

While negotiating the treaties with the tribes, Isaac Stevens, governor of the Washington Territory, clarified in a letter to his superiors the intent of the government's offer to the Indians: "They would have the right of travelling throughout the country for lawful business; fishing at accustomed places in common with the whites. And going to the mountains for berries. . . ."[44]

This understanding—that the parties were bargaining for the right of common access to the fishery—was also reflected in a report by George Gibbs, frequently referred to as the "author" of the treaties: "[T]hey [the Indians] require the liberty of motion for the purpose of seeking, in their proper season, roots, berries, and fish, where those articles can be found."[45]

On more than one occasion, the tribes were informed they were bargaining for a right of access to the then abundant fish resource. Governor Stevens, in his negotiations at the Treaty of Point Elliot on Monday, January 22, 1855, stated:

> We want to place you in homes where you can cultivate the soil, using potatoes and other articles of food, and where you will be able to pass in canoes over the waters of the Sound and catch fish and back to the mountains to get roots and berries.[46]

On a second occasion, an agent of the United States explained to the Indians that if they would relinquish all but small reserves of their lands, "the privilege was given of going wherever else they pleased to fish and work for the whites."[47]

On the other hand, there is evidence that the intent of the Indians at the treaty negotiations may not have been rooted solely in obtaining a right of access but in securing a permanent food resource for the tribes. One-lun-teh-tat, a Skokomish Indian spokesman at the treaty negotiations, said:

> I wish to speak my mind as to selling the land—Great Chief. What shall we eat if we do so? Our only food is berries, deer

44. *See* Brief for Petitioners, Washington State, at 46, *id.*
45. *Id.* at 33.
46. *Id.*
47. *Id.*

> and salmon. Where then shall we find these? I don't want to sign away all my land. Take half of it and let us keep the rest. I am afraid that I shall become destitute and perish for want of food.[48]

Proponents of the guaranteed-share interpretation of the treaties argue that this interpretation carries out the representation made by Governor Stevens to the Indians when he said, "This paper [treaty] *secures* your fish."[49]

Although a study of the contemporaneous written and oral representations made during treaty negotiations is helpful, understanding the true intent of the treaties is complicated by the fact that communication between the parties was obstructed by both language and cultural barriers. The vast majority of Indians at the treaty councils did not speak or understand English. The treaty provisions were written in English; clauses often were drafted before any formal meeting at a treaty ground.[50] At the negotiations, the treaty provisions and the remarks of the negotiators were interpreted in Chinook jargon.[51] Unfortunately, many of the Indians themselves could not understand Chinook jargon; therefore, the jargon was translated into native language by Indian interpreters.[52]

Chinook jargon provided a simple 300-word commercial vocabulary that did not include words corresponding to many of the treaty terms.[53] For example, there were no words for "common," "usual," "accustomed," "citizens," "steelhead," and other phrases, many of which have become controversial in the interpretation of the treaties.[54]

Despite the language limitations, the treaty negotiations apparently were viewed as a success by the parties. Although the tribes had given up almost all the land that they had aboriginally possessed, they assumed that they had received a fair bargain. On January 31, 1855, at the close of the treaty negotiations, Governor Stevens met with the chiefs and headmen of the Makah Tribe at Neah Bay. The signing ceremony is recorded as follows:

48. *Id.* at 32.

49. Brief for Respondents, United States, at 56 (emphasis added), *id.*

50. *See* Brief for Respondents, Indian Tribes, at 17, *id.*

51. *Id.*

52. Brief for Petitioners, Washington State, at 34, *id.*

53. *See* United States v. Washington, 384 F. Supp. 312, 330 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

54. Brief for Respondents, Indian Tribes, at 17, 443 U.S. 657 (1979).

> Tse-Kaw-Wootl (a chief of the Majoahs) brought up a white flag and presented it saying, "look at this flag, see if there are any spots on it. There are none, and there are none on our hearts." Kalchote (another chief) presented another flag. "What you have said was good, and what you have written is good." The Indians gave three cheers or shouts as each concluded. The Governor then signed the treaty, and was followed by the Indian chiefs and principal men.[55]

The presentation of white flags by the tribes symbolized their feeling that the United States had dealt fairly with them and that their right to fish, the nucleus of their culture, had been preserved. The responsibility was then left to the courts to interpret how the treaties were intended to secure this right.

C. *The Applicable Cases*

Four cases litigated in the state of Washington and ultimately decided in the United States Supreme Court have confronted the treaty language involved in the instant case. These cases have provided some ammunition for both sides concerning whether the treaties secure to the Indians merely access and an equal opportunity with others to fish, or whether the treaties guarantee a specific share of the fish to the tribes.

1. *United States v. Winans*

In *United States v. Winans*,[56] the United States brought suit on behalf of the Yakima Nation to enjoin nontreaty fishermen from obstruction of the tribe's treaty fishing rights on the Columbia River in Washington state.[57] The nontreaty fishermen had obtained title claims under United States patents to lands bordering on the Columbia River. They also had obtained licenses from the state to maintain devices for taking fish called "fish wheels."[58]

The United States Supreme Court rejected the lower court's finding that the 1855 treaty gave no additional fishing rights to the tribes than it gave to any other state inhabitant. The Court considered such a view "an impotent outcome to negotiations and a convention, which seemed to promise more and give the

55. *See id.* at 5-6.

56. 198 U.S. 371 (1905).

57. *Id.* at 379.

58. *Id.* Fishing wheels (also called salmon wheels) are devices rotated by the water current, with scoop nets attached that catch and keep fish in a live state.

word of the Nation for more."[59] Stressing that the tribe's treaty right to fish was as "necessary to the existence of the Indians [as] the atmosphere they breathed,"[60] the Court found that the Yakima Treaty secured to the tribe "a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purpose mentioned."[61] In other words, the treaty "fixes in the land such easements as enables the right [of access] to be exercised."[62] Because the nontreaty fishermen's use of the fish wheels gave them in effect "exclusive possession of the fishing places,"[63] they were enjoined from using the fish wheels until an "adjustment and accommodation"[64] between the treaty and nontreaty fishermen could be effected.

Relying on the Court's instructions in *Winans* calling for an "adjustment and accommodation," advocates for the tribes in the instant case argued that *Winans* requires more than mere right of access—that the anadromous fishery should be fairly apportioned between treaty and nontreaty fishermen.[65] Washington state disagreed, reasoning that the relevant point in *Winans* was the exclusive possession of the space occupied by the fish wheels, which interfered with the Indians' treaty right of access to the fishery.

A closer look at the *Winans* decision reveals that the latter interpretation is more accurate. When the Court spoke of an "adjustment and accommodation," it was referring to a suggestion made by the Solicitor General in the United States' Brief.[66] The "adjustment and accommodation" discussed in the government's brief, and referred to in *Winans*, was in the context of arguing the right of *access* to the trapped fish in the fish wheels, rather than apportionment of equal shares. The Solicitor General argued:

> A decree for appellants [the Indians] must consider the reasonable rights of both parties; restricting the fish wheels if they can be maintained at all, as to their number, method and

59. *Id.* at 380.
60. *Id.* at 381.
61. *Id.*
62. *Id.* at 384.
63. *Id.* at 382.
64. *Id.* at 384.
65. *See, e.g.* Brief for Respondents, United States, at 61; Brief for Respondents, Indian Tribes, at 15, 443 U.S. 657 (1979).
66. *See* 198 U.S. 381, 384 (1905).

> daily hours of operation. Nor can the Indians claim an exclusive right, and *it may be just to restrict them in reasonable ways as to times and modes of access to the property* and their hours for fishing. But by some proper route, following the old trails, and at proper hours, with due protection for the defendants' buildings, stock and crops, *free ingress to and egress from the fishing grounds* should be open to the Indians, and be kept open.[67]

While the *Winans* decision, therefore, speaks in terms of an "accommodation and adjustment," the case viewed *in toto* seems to support the treaty interpretation that the tribes were guaranteed access to their usual and accustomed fishing grounds, rather than an equal share of the harvestable fish.[68]

2. *Puyallup Tribe v. Department of Game (Puyallup I)*

More than sixty years after *Winans*, the Supreme Court was again faced with adjudicating fishing rights involving one of the 1855 treaties. *Puyallup Tribe v. Department of Game (Puyallup I)*[69] involved the construction of the Treaty of Medicine Creek made with the Puyallup and Nisqually Indians.[70] The principal issue was the constitutionality of certain conservation measures adopted by the state of Washington that allegedly impinged the tribes' treaty fishing rights.

The Puyallup and Nisqually Indians were using set nets to harvest fish in their respective off-reservation fishing grounds. The nets were illegal under the conservation laws adopted by the state. The Supreme Court held that "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."[71]

The Court found, however, that the lower court's decision had not clearly resolved the question of whether barring the use of set nets and allowing only hook and line fishing was a reasonable and necessary conservation measure; therefore, the case was remanded for determination of that question.[72]

67. Brief for Appellants, United States, at 54-55, 443 U.S. 657 (1979); United States v. Winans, 198 U.S. 371 (1905) (emphasis added).

68. See notes 56-67 and accompanying text *supra*.

69. 391 U.S. 392 (1968).

70. 10 Stat. 1132 (1854).

71. 391 U.S. 392, 398 (1968). *Accord*, Tulee v. Washington, 315 U.S. 681 (1942).

72. 391 U.S. at 399.

The importance of *Puyallup I*, in terms of the controversy in the instant case, is that the Court described the treaty fishing right as the "right to fish 'at all usual and accustomed' places."[73] The emphasis, therefore, was on access, rather than a right to an equal percentage of the fish. Once again, however, the Court provided some language that could be used by later proponents of the equal share theory. In remanding the case for resolution of the conservation issue, the Court instructed that "the issue of equal protection implicit in the phrase 'in common with'" would also have to be addressed.[74] In subsequent cases, the tribes would argue that "equal protection" mandates an equal division of the fishery resource.[75]

3. *Department of Game v. Puyallup Tribe (Puyallup II)*

After the remand in *Puyallup I*, the Washington Supreme Court upheld the Department of Game's total prohibition of net fishing for steelhead trout. In *Department of Game v. Puyallup Tribe (Puyallup II)*,[76] the United States Supreme Court reversed, holding that unfair discrimination existed in the prohibition because "all Indian net fishing is barred and only hook-and-line fishing entirely pre-empted by non-Indians is allowed."[77]

The Supreme Court then proposed that a formula was needed to apportion between the treaty and nontreaty fishermen the number of fish that could be caught. The Court stated:

> At issue presently is the problem of accommodating net fishing by the Puyallups with conservation needs of the river. . . . If hook-and-line fishermen now catch all the steel-head which can be caught within the limits needed for escapement, then that number must in some manner be fairly apportioned between Indian net fishing and non-Indian sports fishing. . . . What formula should be employed is not for us to propose . . . . The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.[78]

73. *Id.* at 398.

74. *Id.* at 399.

75. *See, e.g.*, 443 U.S. at 674. Opponents, on the other hand, argue that equal protection mandates only an equal opportunity to fish, and nothing more. *See, e.g.*, Washington State Comm'l Passenger Fishing Vessel Ass'n v. Tollefson, 89 Wash. 2d 276, 285-86, 571 P.2d 1373 (1977).

76. 414 U.S. 44 (1973).

77. *Id.* at 48.

78. *Id.* at 48-49.

The Supreme Court again remanded the case to the state courts, this time to determine the exact formula that would "fairly apportion" the steelhead run between the hook-and-line sports fishing and the Puyallups' net fishing.[79]

4. *Puyallup Tribe, Inc. v. Department of Game (Puyallup III)*

In *Puyallup Tribe, Inc. v. Department of Game (Puyallup III)*,[80] the Supreme Court upheld an order allowing 45 percent of the natural[81] steelhead run to be taken by the Puyallup Indians through commercial net fishing.[82] The majority recognized that the treaties secured to the Indians more than merely a right to compete with nontreaty fishermen on an individual basis. However, the case made it clear that treaty Indians could not rely on their treaty rights to exclude other citizens from receiving a fair apportionment. Not only were the tribes restricted to a specified percentage of steelhead taken off their reservations, but also the tribes could not claim an exclusive right to take steelhead passing through their reservations.[83]

II. *Instant Case*

In *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*,[84] the Supreme Court's assignment was to interpret with greater accuracy the important treaty provisions securing off-reservation fishing rights to the treaty Indians, thereby resolving the conflict between state and federal courts regarding what rights, if any, the Indians have to a share of the anadromous fish in Washington state. Indeed, the Court's responsibility was to resolve "[o]ne of the most significant state-federal conflicts since the Civil War. . . ."[85] The Ninth Circuit claimed that this conflict involved, next to some desegregation cases, "the most concerted official and private efforts to frustrate

79. *Id.* at 49.

80. 433 U.S. 165 (1977).

81. The *hatchery* steelhead runs, which were reared by the state at the expense of licensed fishermen, apparently were not affected by the Court's decision.

82. "Under Washington state law steelhead are a game (noncommercial) fish which can be taken only by hook and line. Since Indians traditionally fish only with nets, an accommodation was necessary in the Puyallup . . . cases to permit Indians to fish for steelhead with nets. . . ." Petitioners' Reply Brief for certiorari, Puget Sound Gillnetters Ass'n, at 7.

83. 433 U.S. 165, 177 (1977).

84. 443 U.S. 658 (1979).

85. D. GETCHES, D. ROSENFELT, C. WILKINSON, FEDERAL INDIAN LAW 618 (1979).

a decree of a federal court witnessed in this century."[86] Because of the widespread defiance of the district court's orders and the unusual significance of the treaty fishing rights issue in the Pacific Northwest, the Supreme Court granted certiorari in the state and federal cases[87] and set out to decide the proper interpretation of the pertinent treaty language.[88]

The Court looked to the historical setting of the treaty negotiations as an aid in discovering the original intent of the parties to the treaties.[89] The majority summarily rejected the equal opportunity theory proposed by the state,[90] reasoning that the idea that

> each individual Indian would share an "equal opportunity" with thousands of newly arrived individual settlers is totally foreign to the spirit of the negotiations. Such a "right," along with the $207,500 paid the Indians, would hardly have been sufficient to compensate them for the millions of acres they ceded to the Territory.[91]

Instead, the Court adopted an "equitable measure" of allocating the anadromous fish resource between treaty and nontreaty fishermen.[92] The majority first determined that under the "in common with" language of the treaties the Indians are entitled to take up to 50 percent of the harvestable runs passing through their usual and accustomed fishing grounds.[93] This 50 percent allocation, however, was meant as a maximum, not as a minimum figure.[94]

86. Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123, 1126 (9th Cir. 1978).

87. 443 U.S. 658, 674 (1979).

88. The Court noted that an earlier denial of certiorari on the treaty interpretation issue, Washington v. United States, 423 U.S. 1086 (1976), did not render the issue finally adjudicated. The earlier denial came at an interlocutory stage in the proceedings; the district court had retained continuing enforcement jurisdiction over the case. Subsequent developments convinced the Court to grant certiorari in the instant case. *See* 443 U.S. at 672 n.19.

89. *See* 443 U.S. at 662-69, 676-77. The court adopted many of the findings of the district court. The district court used extensively the testimony and reports of two well-known anthropologists, who analyzed documents describing the setting and negotiations of the treaties. The anthropologists' testimonies occupied five days of trial and required some 900 pages of transcript in the record. *See* Brief for Respondents, Indian Tribes, at 10, *id.*

90. *Id.* at 676.

91. *Id.*

92. *Id.* at 684.

93. *Id.*

94. *Id.*

The treaty share to the Indians may be reduced if tribal needs can be satisfied by a lesser amount.[95] The reduced allotment must assure that the tribes' "reasonable livelihood needs" will be met.[96] With this and some additional modifications,[97] the Supreme Court affirmed the district court's interpretation of the treaties.

Dealing with the Washington Supreme Court's refusal to comply with the federal district court's orders, the Supreme Court held that "[s]tate-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution."[98] The Washington Supreme Court decisions[99] were vacated and the district court's order that the state's Fisheries Department prepare regulations protecting the tribal treaty fishing rights was upheld.[100]

Justice Powell, writing for the dissent,[101] argued that the pertinent treaty language secured to the tribes merely a right of access to their usual and accustomed fishing sites, and not a right to an allotted percentage of the harvestable fish.[102] He predicted that the majority's allocation of the fishery resource to the tribes would (1) provide them with "an extraordinary economic windfall,"[103] (2) would be difficult to enforce,[104] (3) would unfairly discriminate against non-Indian fishermen,[105] and (4) would "reform a bargain struck more than one hundred years ago."[106]

95. *Id.* at 684-85.

96. *Id.* at 685.

97. The Court disagreed with the district court's exemption of all on-reservation catches and off-reservation catches for ceremonial and subsistence needs; accordingly, the district court's decree was modified to include these catches as part of the tribes' allocation. *Id.* at 685-86. This modification was not insubstantial, in light of the fact that the treaty Indians harvested over 52,000 salmon in 1978 for ceremonial and subsistence purposes. *See* Reply Brief for Petitioners, Puget Sound Gillnetters Ass'n, at 2-3 n.1, *id.*

98. *Id.* at 695.

99. Washington State Comm'l Passenger Fishing Vessel Ass'n v. Tollefson, 89 Wash. 2d 276, 571 P.2d 1373 (1977); Puget Sound Gillnetters Ass'n v. Moos, 88 Wash. 2d 677, 565 P.2d 1151 (1977).

100. 443 U.S. at 696.

101. The dissenting justices were Justices Powell, Stewart, and Rehnquist. *Id.*

102. *Id.* at 697 (Powell, J., dissenting).

103. *Id.* at 705-706.

104. *Id.* at 706 n.9.

105. *Id.* at 706.

106. *Id.* at 706 n.8.

III. *Analysis*

A. *Judicial Rules for Interpreting Treaty Provisions*

During the past 150 years, the Supreme Court has adopted several rules of construction for interpreting treaties with the Indians. The primary policy behind these rules recognizes the unequal bargaining position of the tribes and their trust relationship with the government.[107] Two of the most frequently cited rules for interpreting treaty provisions are (1) the treaties must be construed as they most likely were understood by the Indians, and not according to the technical meaning ascribed by lawyers;[108] and (2) ambiguities are to be resolved in favor of the Indians.[109]

Balanced against the above two rules are additional canons which assure that the intent of the treaty parties will be honored: (1) treaties must be read in light of the common notions of the day and the assumptions of those who drafted them;[110] (2) the obvious meaning of the words used in treaties must not be disregarded by the courts;[111] and (3) treaties must be interpreted and applied in a manner that implements their objectives.[112]

In the past, the Supreme Court generally has exercised judicial constraint by stopping short of varying the terms of a treaty to meet alleged injustices.[113] Injustices, unforeseen contingencies, and the like have usually been left to the Congress to remedy.[114]

107. *See generally* Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows upon the Earth"—How Long a Time is That?* 63 CALIF. L. REV. 601 (1975).

108. *See* Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968); Choctaw Nation of Indians v. United States, 318 U.S. 423 (1943); United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938); Marlin v. Lewallen, 276 U.S. 58 (1928); Jones v. Mechan, 175 U.S. 1 (1899).

109. *See* McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Choctaw Nation v. Oklahoma, 398 U.S. 945 (1970); Squire v. Capoeman, 351 U.S. 1 (1956); Carpenter v. Shaw, 280 U.S. 363 (1930); Winters v. United States, 207 U.S. 564 (1908).

110. *See* Oliphant v. Suquamish Tribe, 435 U.S. 191, 206 (1978).

111. *See* DeCoteau v. District County Court, 420 U.S. 425 (1975); Confederated Bands of Ute Indians v. United States, 330 U.S. 169 (1947); Choctaw Nation of Indians v. United States, 318 U.S. 423 (1943); United States v. Choctaw Nation, 179 U.S. 494 (1900); Best v. Polk, 85 U.S. 112 (1873).

112. *See* United States v. Winans, 198 U.S. 371, 381 (1905).

113. "[E]ven Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943).

114. "We stop short of varying [a treaty's] terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the In-

B. *Impact of an Unforeseen Contingency on Court's Treaty Interpretation*

1. *Creation of a New Canon of Construction?*

When the 1854 and 1855 treaties were negotiated, there was no foresight of the need for future regulation of the fish resource. The parties simply did not contemplate that the then abundant resource would ever become scarce.[115] Consequently, neither the Indians nor the United States intended that their agreements would determine whether, and if so how, a resource always though to be inexhaustible would be allocated between treaty and nontreaty fishermen.[116] The increasing demand on a limited fish supply was a contingency unforeseen by the parties to the treaty.

On the other hand, the contingency of the future private ownership of the lands in Washington Territory *was* foreseen and provided for in the treaties. As recognized in *United States v. Winans*,[117] the tribes reserved the right to cross these private lands and occupy them to the extent and for the purpose mentioned in the treaties. The Supreme Court in the instant case conceded that the written and oral representations made contemporaneous to the signing of the treaties were primarily to assure the tribes that access to their fishing sites would not be impaired.[118] Indeed, the Court called the pertinent treaty language a "specific provision for access."[119]

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dians, is for Congress." Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 353 (1945) (footnote omitted).

115. *See* 443 U.S. at 675; *id.* at 698 (Powell, J., dissenting); Brief for Respondents, Yakima Nation, at 27-28, *id.* at 658.

116. *See id.* at 675.

117. See notes 56-69 and accompanying text *supra*.

118. *See* 443 U.S. at 675.

119. *Id.* There is additional evidence in the language of the treaties themselves, which points to "right of access" as the proper interpretation of the tribes' treaty fishing rights. A paragraph in the Treaty with the Yakimas, 12 Stat. 951 (1855), reads that the tribe has "the right, in common with citizens of the United States, to travel upon all public highways." Under an "equal share" construction of the "in common with" language, the Yakima Nation is entitled to exclude nontreaty citizens from using up to one-half of the public highways in the state. *See* Brief for Petitioners, Washington State, at 55; Petitioners' Reply Brief for Certiorari, Puget Sound Gillnetters Ass'n, at 8. *See also* 443 U.S. 658 (1979).

The treaty language also makes it clear that the Indians reserved an exclusive right of taking fish on their reservations, and only a right in common with other citizens to fish at their traditional fishing places off their reservations. If the Court's interpretation of the off-reservation "in common with" language is correct that it secured to the Indians approximately an equal share of the fishery resource, then the consistent outcome would be

Although the Court viewed the treaties as arm's-length contracts between two sovereign nations,[120] the original intention of the parties did not rule that treaties' construction; instead, the Court took the liberty to modify the treaties in today's modern setting. By so doing, the Court implicitly recognized a new canon of treaty construction—inequities imposed by an unforeseen contingency should be alleviated by adjustment, accommodation, and equitable apportionment of the original treaty rights.[121]

2. *The Court's "Equitable Measure" of the Tribes' Treaty Share*

The United States in its brief was willing to compromise the tribes' treaty share of the harvestable fish in Washington state. The government reasoned that "it is unnecessary to allocate a portion of the fishery in excess of" the reasonable needs of the treaty tribes.[122] The Court used this concession as a springboard for introducing its modifiable allocation doctrine, a doctrine the Court admitted "is not mandated by our prior cases."[123]

The majority first determined that the treaty language secured to the Indians an equal share of the harvestable fisheries, which translates into a 50 percent allocation.[124] It next decided that an "equitable measure" of the tribes' present treaty right requires an adjustment downward, if the reasonable livelihood needs of the tribes can be met by a lesser amount.[125] In other words, the Court delegated to itself and to the district court or special master the responsibility to abrogate that portion of the tribes' predetermined

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that the tribes' on-reservation fishing rights would involve an entitlement to *all* the fish caught on the reservations. The Court ruled, however, that the Indians' reservation catch is to be counted against their 50 percent allocation of the resource. See note 97 *supra*. The more consistent conclusion would have been to recognize the treaties secured exclusive access to fishing places on the reservation, and common access to fishing sites off the reservation. *See* 443 U.S. at 697, 698 (Powell, J., dissenting).

120. 443 U.S. at 675.

121. Some may view this rule as nothing more than an application of the *Winters* doctrine to the treaty fishing rights context; *i.e.*, the Supreme Court is simply holding that implicit in Indian treaties is the reservation of sufficient fish to fulfill the reasonable needs of the Indians. *Cf.* Winters v. United States, 207 U.S. 564 (1908) (treaties implicitly reserve sufficient waters to the tribes to fulfill the purposes of the reservations); *See generally* Pelcyger, *The Winters Doctrine and the Greening of the Reservations*, 4 J. CONTEMP. L. 19 (1977).

122. Brief for Respondents, United States, at 70, 443 U.S. 658 (1979).

123. 443 U.S. at 685.

124. *Id.* at 685, 686.

125. *Id.* at 685.

treaty rights which, in the judgment of the judiciary, is unnecessary to provide a "moderate living" for the Indians.[126]

The Supreme Court's new doctrine seems equitable—something the parties can "live with"—and may be a reasonable solution to a troubling controversy. The Supreme Court's accommodating interpretation of the tribes' controversial fishing rights may be viewed, at least in part, as an attempt to quell a stormy political issue. The decision represents a shift from the *Winans* view of the treaties as granting merely a right of access,[127] and the culmination of a view, first expressed in *Puyallup II*,[128] that some adjustment should be made on policy grounds to accommodate the interests of all parties to a treaty controversy.

The Court's accommodating interpretation of the treaties can be justified in light of the *Winans* doctrine, which considered the 1854 and 1855 treaties as "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[129] To the extent that the tribes refrained from ceding their fishing rights, the rights were retained. The *Winans* doctrine, therefore, seems to recognize that the tribes reserved, beyond the mere right of access, a right to a sufficient share of the harvestable fish to meet their reasonable needs.[130] Hence, when the resource became no longer limitless, the Court's equitable apportionment became justified.

C. *Modifiable Allocation Doctrine: Product of an Activist Judiciary?*

1. *Enforcement and Management "Nightmare"*

During the past several years of litigation, the federal judiciary has unfortunately been thrust into the management of the fisheries industry of the Pacific Northwest. This is an area of responsibility with which it is admittedly inexperienced.[131] The federal district court judge has been hung in effigy, pegged for impeachment, his life threatened, and otherwise been ostracized for becoming the "fishmaster" of the Pacific Northwest.[132]

126. *Id.* at 685-86.

127. See notes 56-69 and accompanying text *supra.*

128. See notes 76-79 and accompanying text *supra*

129. 198 U.S. 371, 381 (1905).

130. *See* 443 U.S. 657, 676-77 (1979).

131. *See* Brief for Respondents, United States, at 80. *Id.* at 658.

132. *See* Brief for Petitioners, Washington State, at 25; Petitioners' Brief for Certiorari, Puget Sound Gillnetters Ass'n, at 21-22. *Id.*

Criticism also exists against federal law enforcement personnel, who have been marshalled into Washington state to take over what is basically a local law enforcement problem.[133]

Some persons blame this enforcement and management nightmare[134] partly on "judicial activism."[135] The instant case may be criticized as an example of the Court exercising prerogatives of treaty adjustment and accommodation that have been specifically reserved for Congress.[136] A practical look at the circumstances surrounding this controversy, however, indicates that the Court really had no choice but to assure an active posture in resolving the instant case.

2. *Justification for the Supreme Court's Active Posture*

Congressional inactivity, a litigious society, recalcitrant state and local officials, together with a controversy of dangerous proportions, provide justification for the Supreme Court's apparent overstepping into a legislative role to determine tribal treaty rights. The Court should not bear the blame for assuring an active posture when both the citizens of a state and the federal government look to it for resolution of a controversy. The parties to the instant case assumed the conflict could be resolved only by the United States Supreme Court.[137] Even the Congress looked to the Supreme Court and encouraged it to make an "authoritative resolution."[138]

If the Supreme Court had refused to make some effort at accommodating the needs of the parties, the fishery controversy might have been disastrous. Both treaty and nontreaty fishermen had predicted that, without judicial assistance, an entire industry

133. *See* Brief for Respondents, United States, at 20. *Id.*

134. *See* Brief for Petitioners, Washington State, at 114; Petitioners, Brief for Certiorari, Puget Sound Gillnetters Ass'n, at 25. *Id.*

135. *See generally* TIME, Jan. 22, 1979, at 91.

136. "The federal courts below have shut their eyes to what the text of the Stevens treaties, the history of their negotiations, constitutional considerations, and simply common sense all show. If they have done so in an effort to remedy some perceived injustice to the Indians, they have exceeded the limited role assigned to the judiciary." Brief for Petitioners, Puget Sound Gillnetters Ass'n, at 34. 443 U.S. 657, 658 (1979).

137. *See* Brief for Respondents, United States, at 59; Petitioners' Brief for Certiorari, Puget Sound Gillnetters Ass'n, at 30. *Id.*

138. On Feb. 11, 1977, a Washington congressional delegation sent a letter to the United States Attorney General, urging that "authoritative resolution by the Supreme Court would benefit all parties." *See* Petitioners' Brief for Certiorari, Washington State, at 11. *Id.*

and resource could come to a quick demise.[139] Frustrations and impatience led to the destruction of property, gunpoint confrontations, and near loss of life.[140] One state court judge commented, "I do not exaggerate when I say that all too frequently lives and property rights have already hung in the balance."[141]

The reluctance of state and local officials to comply with the decrees of a federal district court only increased federal judicial activity. As one court of appeals judge commented:

> I deplore situations that make it necessary for us to become enduring managers of the fisheries, forests, and highways, to say nothing of school districts, police departments and so on. The record in this case . . . makes it crystal clear that it has been the recalcitrance of Washington state officials (and their vocal non-Indian commercial and sports fishing allies) which produced the denial of Indian rights requiring intervention by the District Court. This responsibility should neither escape notice nor be forgotten.[142]

Finally, in resolving the instant case, the judiciary may have been justified to assume an active posture because it is the most competent forum for devising solutions to controversies of this kind and magnitude.[143] In addition, the judiciary may be the most available forum under the circumstances of this case. As one commentator said, "To refer Indians to Congress for a legislative definition of the extent to which the state must satisfy Indian economic need would be unfair and impractical. . . . Congress is too busy to resolve every dispute over resources in a federal system."[144] The instant case provides an example of a commendable and relatively prompt attempt to determine what rights belong to the treaty tribes of the Pacific Northwest.

139. As one party put it, "If respect for the law is not soon restored, there will eventually be no salmon left for the litigants in these cases to fight over." *Id.*, Respondent's Brief in Opposition of Certiorari, United States, at 20. *See also* Petitioners' Brief for Certiorari, Puget Sound Gillnetters Ass'n, at 24, 30. *Id.*

140. *See* Petitioners' Brief for Certiorari, Puget Sound Gillnetters Ass'n, at 26. *Id.*

141. Puget Sound Gillnetters Ass'n v. Moos, 88 Wash. 2d 677, 698, 565 P.2d 1151 (1977) (Stafford, J., concurring in part, dissenting in part).

142. United States v. Washington, 520 F.2d 676, 693 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) (Burns, J., concurring).

143. *See generally* Comment, *State Power and the Indian Treaty Right to Fish*, 59 CALIF. L. REV. 485 (1971).

144. *Id.* at 510.

IV. *Conclusion*

In the instant case, the Supreme Court interpreted treaty fishing rights in a way that could meet the needs of the modern fishermen of the Pacific Northwest. The case provides an example of the judiciary exercising powers normally reserved to the legislative branch of government. Such role changing may have been justified in light of the seriousness of the controversy and the need for prompt resolution. The decision was necessary to resolve a disturbing state-federal conflict of potentially disastrous dimensions.

It would be naive to assume that the instant case represents the end of the fishing rights controversy in the Pacific Northwest. "In an area so politically charged—involving the role of powerful state and federal agencies, sophisticated conservation programs, and major commercial industries—litigation cannot be a final answer."[145] Congress may yet be called upon to make the final determination of the extent of the modern treaty fishing rights of the Pacific Northwest Indians.[146] Until then, the highest court of the land has provided the most authoritative answer to date.

145. D. GETCHES, D. ROSENFELT, C. WILKINSON, FEDERAL INDIAN LAW 626 (1979).

146. Tens of thousands of signatures have been gathered on petitions to Congress for abrogation of Indian treaties. It may be that the Court's liberal construction of the treaties in the instant case will lead ultimately to a legislative "backlash" in the form of treaty abrogation or forced legislative settlement. *See id.* at 627.